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Supreme Court of the United States

OCTOBER TERM, 1931.

NO. 401

AMERICAN SURETY COMPANY OF NEW YORK,
Petitioner,

v.

THE GREEK CATHOLIC UNION.

PETITION FOR REHEARING.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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To the Honorable the Judges of said Court:

The petition of the Greek Catholic Union, by its counsel, Thomas Stephen Brown and Ralph C. Davis, respectfully prays the Court to grant a rehearing in the above entitled proceeding, for the following reasons:

(1) The Court, in its opinion, states: "It appears, however, by the administration of the United States Trust Company, the debts have been paid almost in full and some assets of doubtful value remain". The above statement of fact by the Court is contrary to the true facts of this case. Under the laws of the Commonwealth of Pennsylvania, and as laid down by the Circuit Court of Appeals, such a fact, if so, should have been proven as a defense by the Surety Company. Therefore, the statement of the witness under examination was a mere general one, and the true facts in regard thereto were

not offered in evidence. Plaintiff was prepared to prove, if the burden placed upon the Surety Company, as counsel understood the law to be, prior to this decision, had been assumed by it; that then, under the favorable administration of the United States Trust Company, the facts would show that the Surety Company was saved much more than the amount claimed in this suit.

(2) The Court in its opinion states: "There is nothing in the instrument which by the furthest stretch of construction can be said to undertake the loss due to an agreement of the corporation to substitute some other bank or trust company for the Peoples Bank." Nowhere in the record nor as a fact was there any attempt to substitute any other bank or trust company for the Peoples Bank. The Greek Catholic Union did not allege nor did it attempt to prove in any way that the Surety Company was liable or could be held liable for any act, actions, or failure to act of the United States Trust Company. There was no attempt by the insured to substitute any other bank or trust company, nor any new obligation of any kind whatsoever upon the surety. The Peoples Bank was not mentioned in the bond as the depository. The By-Laws required the Treasurer to keep the funds in a safe bank or banks without any designation of such bank or banks, except that they should be safe. When it was found that the Peoples Bank, in which the Treasurer was keeping the money, was unsafe, it was no violation of the bond or any feature thereof for the Union to require the money to be kept in a safe bank, as the United States Trust Company, whether Kondor continued as Treasurer or not; and there is no claim that Kondor's surety was liable for any failures on the part of the new depository with respect to payment of interest on funds. Nowhere in the record are there any facts upon which the Court can base its opinion that the insured substituted a new and different

liability from any undertaken in the instrument of suretyship. The only liability claimed of the Surety Company was that arising from the admitted breach of the treasurer.

(3) The Court in its opinion states: "The voluntary action of the respondent in making an entirely new agreement whereby in effect it loaned $200,000.00 to the United States Trust Company for four years without interest, caused the loss for which this suit is brought." This seems to us to be a mistaken conclusion from the facts proven in the case, and probably arose from the mistake of fact earlier in the opinion, where the court states: "The trust company proceeded with the liquidation of the affairs of the former bank, and at the expiration of the stipulated four year period paid the respondent the remaining $200,000. Respondent then brought this action". Suit was brought in the Common Pleas Court of Allegheny County, Pennsylvania, on or about March 24th, 1925, and as shown by the docket entries (Record, page 1) exemplification thereof was filed April 30th, 1925, in the District Court three years before the expiration of the stipulated four year period. The cause of the loss, as shown quite distinctly by the evidence, was the default of the Treasurer Kondor, which default brought the Greek Catholic Union into a position where something had to be done, a desperate emergency. The agreement with the United States Trust Company was made for the purpose of saving loss which was shown to be sure to follow. That agreement did not cause a loss, but saved a loss, and was a benefit to both the Union and the Surety Company, as it is quite clearly shown by the evidence and the facts. To view the case in the light that the agreement made for purposes of salvage was the cause of the loss seems to us to be a complete misconception of the situation. Undoubtedly, according to the facts, if that agreement had not been made, the loss

both to the Union and to the Insurance Company would have been greater than the amount we claim.

Respondent made no claim, nor are there any facts in the record, upon which the Court could base its opinion that the loss claimed by it was for any interest or money or damages of any kind arising from or out of any action or actions or lack or failure thereof, of, or by the United States Trust Company.

(4) Prior to this decision, the law was that an insured, by reason of an alleged variance to escape liability, must show that the alleged breach was more than a mere technical departure from the letter of the bond,—that it was a departure which results in substantial prejudice and injury to its position. That it must prove that the change was "material and prejudicial". Whether such variation occurred prior or subsequent to an alleged breach should not affect a general principle of law. To hold that said principle of law applies prior to a breach but does not hold subsequent thereto means that an insured may, prior to a breach, modify a surety contract without releasing the insurer, unless the insurer proves it was material and prejudicial, but that subsequent to a breach an insured can do nothing either to protect itself or its surety without thereby releasing the insurer.

(5) Counsel for the Greek Catholic Union respectfully represents that this case was tried, upon the law, as counsel understood it to be prior to this decision, that having proven conclusively "the breach for which indemnity was to be afforded was Kondor's default in the performance of his duties and with respect to the protection of the funds of the corporation", or, as stated otherwise in the opinion of this Court, "The parties agree that Kondor's conduct, with respect to the deposit in the Peoples Bank, was a breach of his obligation, and

entailed a liability upon the bond", that the burden was then placed upon the Surety Company to prove that the subsequent acts created a material variance to the prejudice of the Surety Company. Counsel believed that the Surety Company was required to prove more than a mere technical variation, to-wit, the deprivation of the insured of the right of subrogation, unless the actual facts showed such to be to its prejudice. Counsel knew that the Surety Company would not be able to so do for the reason that the Union's actions as shown by the resulting facts were for the benefit of the Surety Company. These facts are not in the realm of conjecture nor was it necessary to prove the consequences of an event that never happened. The Union can prove what actually happened and that the result thereof was to the benefit of the Surety Company. These facts can be proven by the books of the Peoples Bank, as shown by audits of its accounts by the officers of the State Banking Department of the Commonwealth of Pennsylvania, by the officers of the United States Trust Company and by the audit made by the auditor of the Surety Company itself.

(6) The Court in its opinion states "Where an insured without the agreement of the insurer undertakes to substitute a new obligation under a new agreement with a third party in lieu of those arising from a breach of the officer whose fidelity is insured, thus substituting a new and different liability from any undertaken in the instrument of suretyship, and depriving the insurer of the right of subrogation, such conduct operates to discharge the obligation of the indemnity contract."

Petitioner respectfully suggests that the facts of this case are not within the above principle. No new obligation was substituted, the surety company was under no obligation of any kind with reference to the agreement with the United States Trust Company.

There was no new and different liability substituted from that undertaken in the instrument of suretyship. The insurer was deprived of the right of subrogation, but, under the facts of this case, to its benefit, which facts can be proven, and respondent should be afforded an opportunity to so prove, if the Court will remand this case for retrial.

THOMAS STEPHEN BROWN,
RALPH C. DAVIS,
Counsel for Greek Catholic Union.

We hereby certify that the foregoing petition is presented in good faith and not for delay.

THOMAS STEPHEN BROWN,
RALPH C. DAVIS,
Counsel for Greek Catholic Union.